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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 154.

CHRISTIAN A. JOHNSON and CAMERON BIEWEND Individually and as a Committee of the Common Stockholders of ELECTRIC POWER & LIGHT CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and ELECTRIC POWER & LIGHT CORPORATION.

BRIEF OF ELECTRIC POWER & LIGHT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Question Presented.

The petition for a writ of certiorari presents only a question of fact. That question is as to the quantum of compensation representing fair value for the services rendered by petitioners in a reorganization proceeding under Section 11 of the Public Utility Holding Company Act of 1935. It is an appraisal of the value of services which is involved, and nothing more. Whether it be value to the estate in reorganization, to the class of securities represented by petitioners, to the reorganization proceeding, to the COMMISSION, or to all four, the question is the same: What were the services worth?

Facts.

This petition involves one of the final steps in winding up the estate in reorganization of ELECTRIC.* The PLAN was carried out more than five years ago and ELECTRIC was dissolved.

The services of petitioners and their associates were rendered in connection with proceedings before the COMMISSION, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit, and to a slight extent before this Court.** There were four classes of securities dealt with by the PLAN, including common stock. There were three principal representatives of the common stock. Petitioners as a committee constituted one of them. The common stock was also represented by the parent company of ELECTRIC, namely, BOND AND SHARE, which owned some other securities and had an adverse interest on claims, but the interest of BOND AND SHARE was predominantly common stock. In addition, the common stock was represented by the Sincoff Committee, which was active and aggressive in the proceedings.

The matters for which petitioners claim compensation or reimbursement are as follows (App. 217a):

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* For convenience, the following abbreviated terminology will be used in this brief:

BOND AND SHARE—Electric Bond and Share Company, the parent company of ELECTRIC.

COMMISSION—Securities and Exchange Commission.

ELECTRIC—Electric Power & Light Corporation.

PLAN—Plan for Compliance by Electric Power & Light Corporation with Section 11 of the Public Utility Holding Company Act of 1935, which was the subject of the proceeding in which the services were rendered which are the subject of the petition here.

** *In re Electric Power & Light Corporation*, 337 U. S. 903 (1949).

	Fees	Expenses
Burns, Blake & Rich, counsel....	$35,975	$2,770.06
P. Harold Peterson, witness....	12,189*	—
Becker, Berman & Odell, additional counsel	5,000*	1,049.79*
Committee expenses		7,563.10

All the items appearing in the column headed "Expenses" were allowed by the COMMISSION. The fee of Burns, Blake & Rich was allowed in the amount of $9,500. The fee of Becker, Berman & Odell, as additional counsel to the Committee, was disallowed as being duplicative and unnecessary. The compensation of Peterson, the witness, was disallowed on the basis that his testimony "did not in any way aid the Commission" (App. 244a) and his computations were "based upon fallacious analytical foundations" (App. 245a). After argument, the District Court held these findings of the COMMISSION to be supported by substantial evidence and to have been arrived at in accordance with legal standards, approved them as fair and equitable, and enforced them as part of the PLAN (App. 288a-292a). On appeal, the Court of Appeals affirmed (R. 305).

In general, the PLAN gave rise to two principal problems:

> (1) an analysis of the relative positions of the various classes of securities of ELECTRIC and the resulting determination of fair and equitable treatment for those securities under the PLAN; and
>
> (2) the settlement of various claims of ELECTRIC and its subsidiaries against its parent, BOND AND SHARE.

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* We understand that the fee and expenses of Becker, Berman & Odell and $2,734.58 of the compensation of Peterson were paid by the Committee. These payments, however, are not included in the Committee expenses shown above.

Petitioners addressed themselves almost entirely to the first of these problems, although as their allocation arguments were successively rejected by the staff of the COMMISSION, the COMMISSION itself and the courts, they devoted increased attention to the claims settlement. But on both issues they failed to have a single point accepted by the COMMISSION or any court at any stage of the proceedings. Moreover, their objections were so unsubstantial that they were unable to secure a stay of the carrying out of the PLAN in the District Court, in the Court of Appeals or in this Court, although all three courts recognized that the carrying out of the PLAN would result in making the appeal almost academic.

POINT I.

The decision of the Commission, which has been enforced by the District Court and affirmed by the Court of Appeals, does not rest primarily upon the fact that petitioners were unsuccessful litigants. It rests upon judgment as to competence, effectiveness and hence value of services, and presents no question of law.

The failure to secure agreement with respect to their ideas regarding the PLAN is not the principal infirmity in the petitioners' fee claims. Their whole case rested on the testimony of one witness, Peterson, who was presented as an expert in the financial field and whose analysis and opinions regarding the PLAN should have been of assistance to the COMMISSION. But Peterson's testimony crumbled; and when it did, petitioners' case, resting on that testimony, collapsed.

This fact is important. Much is made in the petition of the fact that Peterson testified that the market for the securities which came out of the PLAN would go up and of the fact that the market, including the market for such securities, actually has gone up. But such testimony consisted of a mere guess. Since the market must go either up or down, compensation cannot rest on a mere guess as to the direction the market will take. A toss of a coin would furnish as firm a foundation for the right to be paid. An expert witness for common stock may be expected to testify that the market will go up, but an unsupported expression of optimism does not constitute expert testimony. As the Court of Appeals said below (R. 311):

> "It is common knowledge that an intelligent estimate may turn out to be less accurate than an uninformed guess, and a comparatively higher ultimate accuracy of a rejected forecast does not necessarily show that it was a contribution of any recognizable value at the time it was made available."

These considerations also apply to Peterson's unsupported guesses that the earnings of the companies whose securities were distributed under the PLAN would go higher than indicated by estimates made either by ELECTRIC's expert witness or by the COMMISSION.*

The only other witness tendered by petitioners was Johnson, one of the petitioners, and he stated specifically that in his testimony he accepted Peterson's earnings forecasts and Peterson's capitalization ratio of projected foreseeable earning power (Unprinted Record, Vol. Ia, pp. 5387-5388). He added nothing of his own.

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* It is significant that although the argument in the petition rests upon the alleged superiority of Peterson's testimony, that testimony, which is not lengthy considering its nature (Unprinted Record, Vol. Ia, pp. 5361-5382 and pp. 5431-5741), is not a part of the printed record.

It follows that *In re Engineers Public Service Co.*, 116 F. Supp. 930 (D. Del. 1953), appeal pending, upon which the petitioners rely so heavily, is not really in point. In that case, in stating the question Judge Leahy adopted the language of the fee claimant's brief to the effect that he had to decide whether "competent services" rendered in representing a class in a Holding Company Act reorganization "with respect to issues found by the Courts to be important and meritorious" are nevertheless non-compensable if they were not ultimately successful (116 F. Supp. at 935).

Moreover, that case is distinguishable upon another ground: as stated by Judge Leahy, the services there "were performed before this court and the appellate courts, as SEC itself has emphasized. Thus, this court is plainly in a position to evaluate the worth of these services just as well as the SEC" (116 F. Supp. at 946). This Court is certainly in no such position with respect to the present petition.

POINT II.

The cases cited by petitioners do not show that there is a question of law involved here—much less one deserving of review by this Court.

The case upon which petitioners rely most heavily, next to the *Engineers Public Service* case dealt with above, is *Heenehan* v. *Prudence Realization Corporation,* 108 F. 2d 103 (2d Cir. 1940). Petitioners' statement of this case (Petition, p. 17) is inaccurate. They say that in that case,

> "the Second Circuit took a position contrary to its present position (although Judge Chase, who rendered the opinion in the case at bar, dissented in the

> *Heenehan* case and therefor remains consistent in his view that the 'benefit' requirement is proper)."

The last sentence in the *per curiam* opinion in that case ends as follows (108 F. 2d at 104):

> "all that we now decide is that if the Superintendent's appeal was a benefit to the estate, the judge had power to make a commensurate allowance for the services rendered."

Judge Chase and the majority of the court were in accord that the benefit rule was applicable. The only difference between him and the rest of the court was that, on the record then before the court, he felt the question of benefit could be decided.

Milbank, Tweed & Hope v. *McCue,* 111 F. 2d 100 (4th Cir. 1940), has in it the following sentence (111 F. 2d at 102):

> "While, as stated by the court below, this controversy was of no benefit to the estate, we cannot say that it was groundless or lacking in good faith; and in view of the confusion then prevailing as to the law, we think that the services so rendered should be considered in fixing the compensation of counsel for the debtor."

In that case the issues litigated were novel issues under a new statute. Moreover, the instant decision of the COMMISSION is not at variance with the *Milbank, Tweed* decision; for here, as there, allowances to a losing party were actually made. Again, the question is solely the factual question of quantum.

Nor is *Smith* v. *Central Trust Co.,* 139 F. 2d 733 (4th Cir. 1944), inconsistent with the fee allowances to the petitioners in this case. The court there said:

> "* * * it is obvious that the failure of the reorganization and the dismissal of the proceedings are facts which should be considered in fixing the amount of the compensation, for the outlay must be made at the expense of the creditors who will have received no benefit from the efforts put forth, no matter how well intentioned they may have been" (139 F. 2d at 738).

In re Inland Gas Corporation, 73 F. Supp. 785 (E. D. Ky. 1947), also relied upon by petitioners, is merely a decision in which the court in a reorganization under the Bankruptcy Act fixed allowances on the basis of facts there before it. Since the instant case involves only the appraisal of services on the basis of other and different facts, the *Inland* case is irrelevant. Certainly it does not lead to the presentation of a question of law for review by this Court.

The petition cites (p. 17) Judge Hincks' opinion in *In re New York, N. H. & H. R. Co.,* 46 F. Supp. 214, 234 (D. Conn. 1942)* for the following statement:

> "To be sure, their effort to develop a plan which should recognize some equity for the old stockholders proved unsuccessful. Nevertheless, lack of success in advocacy on such an issue is a factor affecting the amount rather than the propriety of compensation."

We have searched Judge Hincks' opinion not only on the page cited but throughout, and have been unable to find this quotation. However, this decision, like the *Inland Gas* case, is again a decision primarily of factual significance —a valuation of services on the basis of particular facts

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* Mod. and aff'd in part, *sub nom. Warren* v. *Palmer,* 132 F. 2d 665 (2d Cir. 1942), rev'd in part, *sub nom. Manhattan Co.* v. *New York, N. H. & H. R. Co.,* 171 F. 2d 482 (2d Cir. 1948).

by the court before whom the reorganization proceeding was conducted.

We have disposed of the principal authorities relied upon by petitioners. The others are in the nature of make-weights and are even less persuasive than the ones dealt with above.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: July 27, 1954.

Respectfully submitted,

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